

Federalism: A Foreword

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It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.¹

It was fitting that in his last term Mr. Justice Black should have bequeathed to the American people the phrase "Our Federalism" and the discussion accompanying it—the most eloquent statement on the subject since Chief Justice Chase's reference to "an indestructible Union, composed of indestructible States."² It was fitting also that he should have emphasized Our Federalism's historic origins. The United States under the Constitution was born federalist; it did not truly choose federalism or have federalism thrust upon it. As Chief Justice Chase had said, "Both the States and the United States existed before the Constitution."³ The genius of the Framers lay in devising a unique form of federalism—one in which a national government was authorized to act directly on the people within the powers confided to it rather than solely on the states, and was endowed with an amplitude of powers which might or might not be used as the future would dictate. As Mr. Justice Holmes was later to say, the Framers "called into life a

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1. *Younger v. Harris*, 401 U.S. 37, 44-45 (1971) (Black, J.). The Justice regarded the phrase as embodying "the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.* at 44. He elaborated:

The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id.

2. *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868).

3. *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868).

being the development of which could not have been foreseen completely by the most gifted of its begetters."⁴

Despite the Marshall Court's resounding affirmation of the breadth of the powers conferred on the national government,⁵ the use made of these powers through the first century of our history under the Constitution was restrained. Congress moved speedily to exercise its powers with respect to patents⁶ and copyrights.⁷ The national government conducted foreign affairs, raised and supported an exceedingly modest army and, over considerable protest, provided and maintained an even more modest navy, waged some foreign wars,⁸ borrowed and coined money, levied taxes (primarily import tariffs), created the first and second Banks of the United States, spent money both to purchase the Louisiana Territory and, again over much objection, to make internal improvements, and then, under the impulse of Jacksonian democracy, it withdrew from the banking field. Beyond this the national government did relatively little,⁹ and some of what it did, notably the Fugitive Slave Acts,¹⁰ would not be proudly regarded today. Few people remember that until 1867 we had bankruptcy acts for only seven years, 1800 to 1803 and 1841 to 1843.¹¹

The judiciary made relatively little attempt to rush in where the legislative and executive branches were unwilling to tread.¹² Chief

4. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

5. Most notably, of course, in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

6. Act of April 10, 1790, ch. 7, 1 Stat. 109 (current version in scattered sections of 35 U.S.C.).

7. Act of May 31, 1790, ch. 15, 1 Stat. 124 (current version in scattered sections of 17 U.S.C.).

8. As to all of this, see Professor Abraham D. Sofaer's remarkable book, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER—THE ORIGINS* (1976).

9. As a measure of self-protection I should note that since my endeavor is to present a picture rather than a treatise, I have deliberately painted with a broad brush. I do not pretend to have mentioned all exercises of national power either during the early years or later.

10. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302; Act of Sept. 18, 1850, ch. 60, 9 Stat. 462. The Supreme Court affirmed the constitutionality of these, principally in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842); *Jones v. Van Zandt*, 46 U.S. (5 How.) 215 (1847); and *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858). Both acts were repealed in 1864.

11. See 1 COLLIER ON BANKRUPTCY § 0.04 (1974). Even the Act of 1867 lasted a mere eleven years; the first truly "permanent" Bankruptcy Act dates only from 1898. *Id.* §§ 0.05, .06.

12. An outstanding exception is *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851), where the Court not merely sustained an Act of Congress, Act of Feb. 26, 1845, ch. 19, 5 Stat. 726, extending admiralty jurisdiction to the Great Lakes, but held, overruling *The Steam-Boat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825), that such jurisdiction had always existed and applied also to all navigable waters even though non-tidal. See G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 31-32 & n.99

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Justice Marshall himself authored *Barron v. Mayor of Baltimore*,¹³ which held that the guarantees of the Bill of Rights applied only to the federal government, not to the states; he thought the question to be “of great importance, but not of much difficulty.”¹⁴ After what Professor Gunther calls “gropings,”¹⁵ the Supreme Court arrived at the celebrated formulation of *Cooley v. Board of Wardens* that when Congress had not acted to utilize the commerce power, the states were precluded from nondiscriminatory action only when “subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation.”¹⁶ Judged by today’s standards, Congress did little indeed.

The watershed was the war between the states, the adoption of the three Reconstruction amendments, especially the Fourteenth, and enactment of the various civil rights acts with jurisdiction in the federal courts to enforce them.¹⁷ Although these amendments were doubtless intended primarily to safeguard the rights of the newly emancipated Negroes, Mr. Justice Miller’s prophecy that this would be practically their sole effect¹⁸ turned out to be an exceedingly poor one. In time the due process and equal protection clauses of the Fourteenth Amendment would vest the federal judiciary, particularly the Supreme Court, with a roving authority to invalidate state statutes and, for almost all practical purposes, to reverse the decision in *Barron v. Mayor of Baltimore*.¹⁹ Along with these enactments Congress adopted the National Bank Act of 1864²⁰ and the Bankruptcy Act of 1867.²¹ As important as these substantive changes was the Act of March 3, 1875,²² which for the first time (except for the abortive Judiciary

(2d ed. 1975); C. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANNEY PERIOD, 1836-64, at 442-46 (1974). Mention should also be made of the Court’s vigorous enforcement of the contract clause. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), and the Dartmouth College Case, 17 U.S. (4 Wheat.) 518 (1819).

13. 32 U.S. (7 Pet.) 243 (1833).

14. *Id.* at 247. Professor Gunther suggests that the question was not “all that easy.” G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 489-90 (9th ed. 1975).

15. G. GUNTHER, *supra* note 14, at 285-87. These included one by Marshall himself, *Willson v. The Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829).

16. 53 U.S. (12 How.) 299, 319 (1851).

17. See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 845-46 (2d ed. 1973).

18. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 67-82 (1873).

19. 32 U.S. (7 Pet.) 243 (1833).

20. Act of June 3, 1864, ch. 106, 13 Stat. 99 (current version in scattered sections of 12 U.S.C.).

21. Act of March 2, 1867, ch. 176, 14 Stat. 517 (repealed 1878).

22. Ch. 137, § 1, 18 Stat. 470 (current version at 28 U.S.C.A. § 1331 (West Supp. 1977)).

Act of 1801²³) vested the federal courts with general federal question jurisdiction, although subject to a jurisdictional amount.

Still another score of years elapsed, however, before enactment of the two statutes that were the real beginnings of federal regulation of interstate business—the Interstate Commerce Act of 1887,²⁴ adopted in response to the Supreme Court's holding that state regulation of interstate railroad rates was not permissible under the *Cooley* doctrine,²⁵ and the Sherman Antitrust Act of 1890.²⁶ These were followed, again after the lapse of some years,²⁷ by a burst of legislation in the first Wilson administration—the Clayton Act of 1914,²⁸ the Federal Trade Commission Act of the same year,²⁹ the Shipping Act of 1916,³⁰ and, perhaps most important though least litigated, the Federal Reserve Act of 1913.³¹ The early 1920s saw four other important pieces of legislation extending federal regulatory power: the Transportation Act, 1920,³² which transformed the Interstate Commerce Act by placing "the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission,"³³ the Federal Water Power Act,³⁴ the Packers and Stockyards Act, 1921,³⁵ and the Radio Act of 1927³⁶—the forerunner of the Federal Communications Act.³⁷

23. Ch. 4, § 11, 2 Stat. 89 (repealed 1802). See Friendly, *The Federal Courts in the Third Century*, in NEW YORK UNIVERSITY BICENTENNIAL ESSAYS 197, 198-99 (B. Schwartz ed. 1976).

24. Ch. 104, 24 Stat. 379 (codified in scattered sections of 49 U.S.C.).

25. *Wabash, St. L. & Pac. Ry. Co. v. Illinois*, 118 U.S. 557 (1886).

26. Ch. 647, 26 Stat. 209 (current version at 15 U.S.C. §§ 1-7 (1970 & Supp. V 1975)).

27. Meanwhile the Interstate Commerce Act was strengthened by the Hepburn Act, ch. 3591, 34 Stat. 584 (1906) (codified in scattered sections of 49 U.S.C.), and the Mann-Elkins Act, ch. 309, 36 Stat. 539 (1910) (codified in scattered sections of 49 U.S.C.). Other significant enactments were the Pure Food and Drug Act of 1906, ch. 3915, 34 Stat. 768 (repealed 1938), sustained in *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911), and the Federal Meat Inspection Act, ch. 3913, 34 Stat. 669, 674 (1906) (codified in scattered sections of 5, 7, 16, 21 U.S.C.).

28. Ch. 323, 38 Stat. 730 (codified in scattered sections of 15, 18, 29 U.S.C.).

29. Ch. 311, 38 Stat. 717 (current version at 15 U.S.C. §§ 41-51 (1970 & Supp. V 1975)).

30. Ch. 451, 39 Stat. 728 (current version at 46 U.S.C. §§ 801-42 (1970 & Supp. V 1975)).

31. Ch. 6, 38 Stat. 251 (codified at 31 U.S.C. § 409 (1970) and in scattered sections of 12 U.S.C.).

32. Ch. 91, 41 Stat. 456 (codified in scattered sections of 49 U.S.C.).

33. *Dayton-Goose Creek Ry. Co. v. United States*, 263 U.S. 456, 478 (1924) (Taft, C.J.).

34. Ch. 285, 41 Stat. 1063 (1920) (current version at 16 U.S.C. §§ 791-828c (1970)).

35. Ch. 64, 42 Stat. 159 (current version at 7 U.S.C. §§ 181-229 (1970)).

36. Ch. 169, 44 Stat. 1162.

37. Ch. 652, 48 Stat. 1064 (1934) (current version at 15 U.S.C. § 21(a) (1970); 47 U.S.C. §§ 35, 151-609 (1970 & Supp. V 1975)). Prior to passage of the Communications Act, interstate telephone operations had been, since 1910, under the jurisdiction of the Interstate Commerce Commission under the Mann-Elkins Act. IV B. SCHWARTZ, *THE ECONOMIC REGULATION OF BUSINESS AND INDUSTRY* 2373 (1973); I. SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION* 53 n.53 (1931).

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Contemplating what then seemed a rather amazing array of new statutes extending national power, this writer was prompted to say in 1928:

The steady expansion of the jurisdiction of the federal courts, especially since Reconstruction days, has been but a reflex of the general growth of federal political power. That growth will not abate, since it is responsive to deep social and economic causes.³⁸

Although this must rate as an excellent prediction, little did the author know what the next few years would bring.

If the war between the states was a watershed, the New Deal was a tidal wave. Two remarkable statutes, the Securities Act of 1933³⁹ and the Securities Exchange Act of 1934,⁴⁰ elevated the national government from a negligible to a predominant role with respect to the issuance of and dealings in securities and the operation of the stock exchanges. An equally dramatic change in the field of labor regulation was wrought by the National Labor Relations Act of 1935⁴¹ and the Fair Labor Standards Act of 1938.⁴² The Securities Exchange Act, unlike the Securities Act, provides for exclusive federal jurisdiction.⁴³ Although the National Labor Relations Act does not, a good deal of preemption is furnished by the judicially fashioned rule that "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield."⁴⁴ Even when litigation under this statute can proceed in the

38. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 510 (1928).

39. Ch. 38, tit. I, 48 Stat. 74 (current version at 15 U.S.C. §§ 77a-77aa (1970 & Supp. V 1975)).

40. Ch. 404, 48 Stat. 881 (current version at 15 U.S.C. §§ 78a-78kk (1970 & Supp. V 1975)).

41. Ch. 372, 49 Stat. 449 (current version at 29 U.S.C. §§ 151-169 (1970 & Supp. V 1975)), *sustained in* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

42. Ch. 676, 52 Stat. 1060 (1938), *sustained in* United States v. Darby, 312 U.S. 100 (1941). The Act is presently codified at 29 U.S.C. §§ 201-219 (1970 & Supp. V 1975). Certain of the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, were declared unconstitutional by the Supreme Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976), as infringing the sovereignty of the States. See pp. 1031-33 *infra*.

43. Compare § 27 of the 1934 Act, 15 U.S.C. § 78aa (1970) with § 22 of the 1933 Act, *id.* § 77v.

44. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). The rule was reaffirmed over four strong dissents in *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971). See Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972); cf. *Connell Constr. Co. v. Plumbers Local 100*, 421 U.S. 616, 635-36 (1975) (holding that state antitrust laws were preempted by federal labor legislation in case where federal antitrust laws were not).

state courts, the latter must follow not only the text of the statute but also "federal common law"⁴⁵—a concept representing an advance in federal power that far outweighed the abandonment in the *Erie* case⁴⁶ of "the spurious uniformity of *Swift v. Tyson*."⁴⁷

These major assertions of federal power were accompanied by a host of others—the Tennessee Valley Authority Act of 1933,⁴⁸ the Banking Acts of 1933⁴⁹ and 1935,⁵⁰ the Public Utility Holding Company Act of 1935,⁵¹ the expansion of the Interstate Commerce Act to include motor carriers⁵² and water carriers,⁵³ the Civil Aeronautics Act,⁵⁴ the Federal Power Act,⁵⁵ the Commodity Exchange Act,⁵⁶ the Robinson-Patman Act,⁵⁷ the 1938 amendments to the Federal Trade Commission Act⁵⁸ and to the Securities Exchange Act,⁵⁹ the Natural Gas Act,⁶⁰ the Federal Food, Drug, and Cosmetic Act,⁶¹ the Trust Indenture Act of 1939,⁶² and the Investment Company⁶³ and Investment Advisers⁶⁴ Acts. Perhaps an even more important alteration in the national-state balance was worked by a statute that could hardly have then been thought of as creating such a change—the Social

45. See *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962), citing as controlling *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

46. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

47. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383, 405 (1964).

48. Ch. 32, 48 Stat. 58 (current version at 16 U.S.C. §§ 831-831dd (1970 & Supp. V 1975)).

49. Ch. 89, 48 Stat. 162 (codified in scattered sections of 12 U.S.C.).

50. Ch. 614, 49 Stat. 684 (codified in scattered sections of 11, 12 & 15 U.S.C.).

51. Ch. 687, tit. I, 49 Stat. 803 (current version at 15 U.S.C. §§ 79 to 79z-6 (1970 & Supp. V 1975)).

52. Ch. 498, 49 Stat. 543 (1935) (current version at 49 U.S.C. §§ 301-327 (1970 & Supp. V 1975)).

53. Ch. 722, tit. II, 54 Stat. 929 (1940) (current version at 49 U.S.C. §§ 901-923 (1970 & Supp. V 1975)).

54. Ch. 601, 52 Stat. 973 (1938) (current version at 49 U.S.C. §§ 1301-1542 (1970 & Supp. V 1975)).

55. Ch. 687, tit. II, 49 Stat. 838 (1935) (codified in scattered sections of 16 U.S.C.).

56. Ch. 545, 49 Stat. 1491 (1936) (codified in scattered sections of 7 U.S.C.).

57. Ch. 592, 49 Stat. 1526 (1936) (current version at 15 U.S.C. §§ 13-13c, 21a (1970)).

58. Act of Mar. 21, 1938, ch. 49, 52 Stat. 111 (current version at 15 U.S.C. §§ 41, 44-45, 52-58 (1970 & Supp. V 1975)).

59. Act of June 25, 1938, ch. 677, 52 Stat. 1070 (current version at 15 U.S.C. §§ 78o, 78o-3 (1970 & Supp. V 1975)).

60. Ch. 556, 52 Stat. 821 (1938) (current version at 15 U.S.C. §§ 717-717w (1970)).

61. Ch. 675, 52 Stat. 1040 (1938) (current version at 21 U.S.C. §§ 301-392 (1970 & Supp. V 1975)).

62. Ch. 411, 53 Stat. 1149 (current version at 15 U.S.C. §§ 77aaa to 77yyy (1970 & Supp. V 1975)).

63. Ch. 686, tit. I, 54 Stat. 789 (1940) (current version at 11 U.S.C. §§ 72(a), 107(f) (1970); 15 U.S.C. §§ 80a-1 to -52 (1970 & Supp. V 1975)).

64. Ch. 686, tit. II, 54 Stat. 847 (1940) (current version at 15 U.S.C. §§ 80b-1 to -21 (1970 & Supp. V 1975)).

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Security Act of 1935,⁶⁵ or more accurately the portions of that Act which established assistance programs to be administered by the states in accordance with federal standards, with the national government supplying varying percentages of the funds. In this and similar enactments Congress has found a new and powerful tool to bring the states into line with national thinking under penalty of losing the largesse from the federal fisc.⁶⁶

After some slowing of the congressional mill during the 1940s and 1950s, the legislative expansion of national power resumed in the next two decades. Of prime importance was the effort, after the lapse of nearly a century, to utilize § 5 of the Fourteenth Amendment, which empowers the Congress "to enforce, by appropriate legislation, the provisions of this article."⁶⁷ Here the basic enactments are the Civil Rights Act of 1957,⁶⁸ the Voting Rights Act of 1965,⁶⁹ the Civil Rights Act of 1964,⁷⁰ Title VIII of the Civil Rights Act of 1968,⁷¹ and the Age Discrimination in Employment Act of 1967.⁷² Along with this has come a whole rash of statutes utilizing the commerce power for the promotion of safety⁷³ and the protection of borrowers and con-

65. Ch. 531, 49 Stat. 620 (codified in scattered sections of 42 U.S.C.).

66. In *Steward Mach. Co. v. Davis*, 301 U.S. 548, 586 (1937), the Supreme Court upheld the unemployment compensation provisions of the Social Security Act against a claim that they constituted "weapons of coercion, destroying or impairing the autonomy of the states"; in the companion case of *Helvering v. Davis*, 301 U.S. 619 (1937), the Court rejected a federalism challenge to the old age benefits scheme of the Act. Later the Court held that federal highway funds could be conditioned on a state's compliance with § 12(a) of the Hatch Act (current version at 5 U.S.C. § 1502 (1970 & Supp. V 1975)). *Oklahoma v. United States Civil Service Comm'n*, 330 U.S. 127 (1946). For consideration of possible remaining federalism limits on the spending power, see the discussion and sources cited in P. BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 338-40 (1975), and G. GUNTHER, *supra* note 14, at 251-59.

67. U.S. CONST. amend. XIV, § 5.

68. Pub. L. No. 85-315, 71 Stat. 634 (codified in scattered sections of 5, 28, 42 U.S.C.).

69. Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971, 1973p (1970 & Supp. V 1975)).

70. Pub. L. No. 88-352, 78 Stat. 241 (codified at 28 U.S.C. § 1447 (1970) and in scattered sections of 42 U.S.C.). For reasons not altogether easy to understand today, this statute drew also on the commerce power. See the letters of Professors Gunther and Wechsler in G. GUNTHER, *supra* note 14, at 217-19.

71. Pub. L. No. 90-284, tit. VIII, 82 Stat. 81-90 (codified at 42 U.S.C. §§ 3601-3631 (1970 & Supp. V 1975)).

72. Pub. L. No. 92-202, 81 Stat. 602 (codified in scattered sections of 29 U.S.C.).

73. The single most important is the Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified in scattered sections of 5, 15, 18, 29, 42 U.S.C.). Others are the National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (codified at 23 U.S.C. § 313 (1970) and in scattered sections of 15 U.S.C.); the Highway Safety Act of 1966, Pub. L. No. 89-564, 80 Stat. 731 (codified in scattered sections of 23 U.S.C.); the Natural Gas Pipeline Safety Act of 1968, Pub. L. No. 90-481, 82 Stat. 720 (codified at 49 U.S.C. §§ 1671-1684 (1970 & Supp. V 1975)); the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 (codified in scattered sections of 15, 30 U.S.C.); the Ports and Waterways Safety Act of 1972, Pub. L.

sumers.⁷⁴ Still more important is a series of laws placing the weight of the national government behind efforts to protect the environment.⁷⁵ Considerably more troubling to me, from the standpoint of policy and

No. 92-340, 86 Stat. 424 (codified at 33 U.S.C. §§ 1221-1227 (Supp. V 1975); 46 U.S.C. § 391a (Supp. V 1975)); the Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, tit. II, 84 Stat. 971-77 (codified at 15 U.S.C. §§ 431-441 (1970 & Supp. V 1975)); the Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207 (1972) (codified in 5 U.S.C. §§ 5314, 5315 (Supp. V 1975); 15 U.S.C. §§ 2051-2081 (Supp. V 1975)); the Motor Vehicle and Schoolbus Safety Amendments of 1974, Pub. L. No. 93-492, 88 Stat. 1470 (codified in scattered sections of 15 U.S.C.); the Transportation Safety Act of 1974, Pub. L. No. 93-633, 88 Stat. 2156 (codified in scattered sections of 45, 46, 49 U.S.C.); the Highway Safety Act of 1976, Pub. L. No. 94-280, tit. II, [1976] U.S. CODE CONG. & AD. NEWS (90 Stat. 451) (codified at 23 U.S.C.A. §§ 101-406 (West Sept. 1976 Pamphlet)); and the Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, [1976] U.S. CODE CONG. & AD. NEWS (90 Stat. 503) (codified at 15 U.S.C.A. §§ 1193-2080 (West Sept. 1976 Pamphlet); 18 U.S.C.A. § 1114 (West Sept. 1976 Pamphlet)).

74. These include: the Consumer Credit Protection Act, Pub. L. No. 90-371, 82 Stat. 146 (1968) (codified at 18 U.S.C. §§ 891-896 (1970) and in scattered sections of 15 U.S.C.); the Interstate Land Sales Full Disclosure Act, Pub. L. No. 90-448, 82 Stat. 590 (1968) (codified at 15 U.S.C. §§ 1701-1720 (1970)); the Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1128 (1970) (codified at 15 U.S.C. §§ 1681-1681t (1970)); the Fair Credit Billing Act, Pub. L. No. 93-495, 88 Stat. 1511 (1974) (codified in scattered sections of 15 U.S.C.); the Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, 88 Stat. 1724 (codified at 12 U.S.C. §§ 1730f, 1831b, 2601-2616 (Supp. V 1975)); the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified in scattered sections of 15 U.S.C.); the Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1521 (1974) (codified at 15 U.S.C. §§ 1691-1691e (Supp. V 1975)), and Amendments of 1976, Pub. L. No. 94-239, [1976] U.S. CODE CONG. & AD. NEWS (90 Stat. 251) (codified at 15 U.S.C.A. §§ 1691-1691f (West June 1976 Pamphlet)); the Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, 89 Stat. 1125 (codified at 12 U.S.C. §§ 2801-2809 (Supp. V 1975)); and the Consumer Leasing Act of 1976, Pub. L. No. 94-240, [1976] U.S. CODE CONG. & AD. NEWS (90 Stat. 257) (to be codified in scattered sections of 15 U.S.C.).

In an interesting though not unique instance of federalism in action, see 89 HARV. L. REV. 998, 1000 n.28 (1976) (collecting statutory examples), the Truth in Lending Act, 15 U.S.C. §§ 1601-1665 (1970), which is Title I of the Consumer Credit Protection Act, provides that transactions may be exempted from the Federal Act's requirements if the Federal Reserve Board (FRB) determines that state law provides for "substantially similar" disclosure and "adequate" enforcement, 15 U.S.C. § 1633 (1970). A panel of the Second Circuit has sustained the FRB's view, *see* FRB Reg. Z, 12 C.F.R. § 226.12(c) (1975), that federal court jurisdiction over private Truth in Lending suits continues in exempted states. *Ives v. W.T. Grant Co.*, 522 F.2d 749, 752-56 (2d Cir. 1975), *criticized in* 89 HARV. L. REV. 998, 1006 (1976).

75. The basic statute is the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified at 42 U.S.C. §§ 4321-4347 (1970 & Supp. V 1975)). Other important statutes are the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (codified in scattered sections of 33 U.S.C.); the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (current version in scattered sections of 49, 50 U.S.C.); the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. §§ 1251-1376 (Supp. V 1975) and in scattered sections of 12, 15, 31 U.S.C.); the Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 973 (codified at 7 U.S.C. §§ 136-136y (Supp. V 1975); 15 U.S.C. §§ 1261, 1271 (Supp. V 1975); 21 U.S.C. §§ 321, 346a (Supp. V 1975)); the Noise Control Act of 1972, Pub. L. No. 92-574, 86 Stat. 1234 (codified at 42 U.S.C. §§ 1234-1250 (Supp. V 1975); 49 U.S.C. § 1431 (Supp. V 1975)); and the Deepwater Port Act of 1974, Pub. L. No. 93-627, 88 Stat. 2126 (codified at 33 U.S.C. §§ 1501-1524 (Supp. V 1975); 43 U.S.C. § 1333(a)(2) (Supp. V 1975)).

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even from that of constitutionality, has been what seems a knee-jerk tendency of Congress to seek to remedy any serious abuse by invoking the commerce power as a basis for the expansion of the federal criminal law into areas of scant federal concern.⁷⁶

The judiciary has made its own contribution to the growth of national power. I have already referred to one that seems to me wholly salutary—the development of federal common law.⁷⁷ More controversial has been the selective incorporation doctrine whereby the due process clause of the Fourteenth Amendment has been held to make applicable to the states all the provisions of the first eight amendments except the Second, Third, and Seventh, the indictment clause of the Fifth, and the excessive bail protection of the Eighth.⁷⁸ This constitutional revolution, effectively overruling *Twining v. New Jersey*⁷⁹ and *Adamson v. California*,⁸⁰ became an even greater force for federalizing state criminal procedure as a result of the expansion of federal habeas corpus for state prisoners wrought initially by *Brown v. Allen*⁸¹ and expanded by *Fay v. Noia*.⁸² In the wake of Supreme Court decisions, notably *Monroe v. Pape*,⁸³ there has been an unparalleled resort to the long-dormant civil rights acts of the Reconstruction period—not simply to prevent discrimination against blacks

76. See H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 56-61 (1973); G. GUNTHER, *supra* note 14, at 194-203.

77. See the cases and discussion in P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 17, at 756-837.

78. The principal decisions accomplishing this include: *Mapp v. Ohio*, 367 U.S. 643, 650-55 (1961) (4th Amendment exclusionary rule); *Robinson v. California*, 370 U.S. 660, 664-66 (1962) (8th Amendment prohibition of cruel and unusual punishment); *Gideon v. Wainwright*, 372 U.S. 335, 340-42 (1963) (6th Amendment right to counsel); *Ker v. California*, 374 U.S. 23, 30-34 (1963) (4th Amendment exclusionary rule); *Malloy v. Hogan*, 378 U.S. 1, 4-11 (1964) (5th Amendment right to remain silent); *Pointer v. Texas*, 380 U.S. 400, 403-06 (1965) (6th Amendment right to confront witnesses); *Klopfer v. North Carolina*, 386 U.S. 213, 222-23 (1967) (6th Amendment right to a speedy trial); *Washington v. Texas*, 388 U.S. 14, 17-19 (1967) (6th Amendment right to compulsory process); *Duncan v. Louisiana*, 391 U.S. 145, 147-58 (1968) (6th Amendment right to jury trial); *Benton v. Maryland*, 395 U.S. 784, 794-96 (1969) (5th Amendment prohibition of double jeopardy); *In re Winship*, 397 U.S. 358, 361-64 (1970) (proof beyond reasonable doubt). The Court has never had to say whether the Eighth Amendment's prohibition against excessive bail applies to the states, although the lower courts have held that it does, see A. GOLDSTEIN & L. ORLAND, *CRIMINAL PROCEDURE* 425 (1974); Y. KAMISAR, W. LAFAVE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 772-73 (4th ed. 1974); and the Court itself has hinted as much, see *Schilb v. Kuebel*, 404 U.S. 357, 365 (1972). On the indictment clause of the Fifth Amendment, see *Hurtado v. California*, 110 U.S. 516 (1884) (holding no incorporation), and, more recently, *Branzburg v. Hayes*, 408 U.S. 665, 688 n.25 (1972) (citing *Hurtado* with approval).

79. 211 U.S. 78 (1908).

80. 332 U.S. 46 (1947).

81. 344 U.S. 443 (1953).

82. 372 U.S. 391 (1963).

83. 365 U.S. 167 (1961).

but to redress many other sorts of constitutional deprivations, particularly in state prisons. In carrying out this mission, federal courts have felt authorized to take on an enormous degree of supervision of the operations of state prisons and mental institutions and to impose affirmative obligations on the states.⁸⁴ One federal court, in an effort to obtain minority representation, has ordered the complete remodeling of a city government.⁸⁵ The risks of confrontation are serious.⁸⁶

Other potent weapons for increased national power recently forged by the Supreme Court are the expansion of the hearing component of due process evidenced by *Sniadach v. Family Finance Corp.*⁸⁷ and *Goldberg v. Kelly*⁸⁸ and their numerous progeny, the revival of substantive due process thought by some to be implicit in *Roe v. Wade*,⁸⁹ and the holding that the Civil Rights Act of 1871 was an "expressly authorized" exception to the statute prohibiting federal court injunctions against proceedings in state courts.⁹⁰ In addition, the Court has diluted the "reasonable ground—good faith" defense for state officials (in the particular case, members of school boards) from liability for damages under the civil rights laws by a qualification that this defense would not apply if the officer "knew or reasonably should have known that the action he took within his sphere of official responsibility" would violate a plaintiff's constitutional rights.⁹¹

As if this were not enough, many believe—with much reason—that further expansion of national power is required. A former chairman of the Securities Exchange Commission, having closely and critically

84. See *Wyatt v. Stickney*, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part, rev'd in part sub nom.* *Wyatt v. Alderholt*, 503 F.2d 1305 (5th Cir. 1974), discussed in A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 96-98 (1976); CHAYES, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); and Friendly, *supra* note 23, at 204-06. See also *Rehm v. Malcolm*, 371 F. Supp. 594 (S.D.N.Y.), *modified*, 377 F. Supp. 995 (S.D.N.Y.), *aff'd in part and remanded in part*, 507 F.2d 333 (2d Cir. 1974), *on remand*, 389 F. Supp. 964 (S.D.N.Y.), *modified*, 396 F. Supp. 1195 (S.D.N.Y.), *aff'd*, 527 F.2d 1041 (2d Cir. 1975).

85. *Bolden v. City of Mobile*, 423 F. Supp. 384 (S.D. Ala. 1976).

86. The grant of certiorari in *Milliken v. Bradley*, 97 S. Ct. 380 (1976), may indicate concern by the Supreme Court on this score. See also Justice Powell's opinion in *Austin Independent School Dist. v. United States*, 97 S. Ct. 517 (1976) (Powell, J., concurring), joined by the Chief Justice and Justice Rehnquist, concurring in the Court's grant of certiorari, vacation of judgment, and remand in light of *Washington v. Davis*, 426 U.S. 229 (1976), but expressing doubt with respect to the scope of the remedy even if the substantive test of *Washington v. Davis* were met.

87. 395 U.S. 337 (1969).

88. 397 U.S. 254 (1970).

89. 410 U.S. 113 (1973). Some of the numerous attacks on and defenses of the decision are collected or cited in G. GUNTHER, *supra* note 14, at 650-56.

90. *Mitchum v. Foster*, 407 U.S. 225 (1972) (holding 42 U.S.C. § 1983 (1970) an express exception to 28 U.S.C. § 2283 (1970)).

91. *Wood v. Strickland*, 420 U.S. 308, 322 (1975).

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examined what he terms "the Delaware syndrome," has called for a federal law imposing minimum standards of fiduciary responsibility and fairness on all corporations engaged in commerce with more than \$1 million of assets and 300 shareholders.⁹² The proliferation of state statutes designed to aid management in retaining control of interstate enterprises that are locally based or even that simply have property within the state has led the framers of the proposed ALI Federal Securities Code to provide for preemption in the area of tender offers and takeovers.⁹³ The Code proposes other preemption;⁹⁴ some believe it should propose more to avoid the costs and delays of largely duplicative requirements in a field effectively regulated by the national government. Companies that have complied with federal environmental standards naturally object to being obliged to start all over again with the states.⁹⁵ The adoption of many new federal statutes for the protection of consumers and borrowers⁹⁶ may raise again the question of preemption not only in those areas but in the entire field of unfair competition⁹⁷ and antitrust law with respect to interstate or foreign transactions. And surely we will see a federal law dealing with major aircraft accidents where there are plaintiffs from many states and defendants who can be sued in a variety of courts, state and federal, with consequences enticing to choice-of-law buffs but considerably less appealing to litigants.⁹⁸

92. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 700-03 (1974). Professor Cary's proposal and related issues of federal-state corporate regulation were the burden of a recent symposium, *Symposium on Federal and State Roles in Establishing Standards of Conduct for Corporate Management*, 31 BUS. LAW. 859 (1976).

93. See ALI FEDERAL SECURITIES CODE, § 1603(c)(1) & pp. 145-46 (Tent. Draft No. 3, 1974). Newspaper reports indicate that the situation has become so much worse that one wonders whether this change should await enactment of the Code.

94. *Id.* § 1603.

95. Professor Stewart's article, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977), suggests that industry prefers state or local to federal regulation. Presumably, however, industry does not want both.

96. See note 74 *supra*.

97. See Friendly, *supra* note 47, at 414-16.

98. Legislation introduced in the 90th (S. 3305, S. 3306, and S. 4089) and 91st (S. 961 and H.R. 8373) Congresses was not reported out of committee although substantial hearings were held. *Aircraft Crash Litigation: Hearings on S. 3305 and S. 3306 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. (1968); *Aircraft Crash Litigation: Hearings on S. 961 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969). On these proposals, see Note, *Aircraft Crash Litigation*, 38 GEO. WASH. L. REV. 1052 (1970); Note, *Federal Courts—Proposed Aircraft Crash Litigation Legislation*, 35 MO. L. REV. 215 (1970). For discussion of judicial reactions to the problem in the absence of specialized legislation, see Note, *The Applicability of Federal Common Law to Aviation Tort Litigation*, 63 GEO. L. REV. 1083 (1975), and

Yet the movement has not been all in one direction. The cases stemming from the decision with which we began, *Younger v. Harris*,⁹⁹ afford one illustration. The Court has advanced from its position in *Younger* that a federal court may not enjoin a pending state criminal proceeding brought in good faith even when the federal court plaintiff is suing under the Civil Rights Act,¹⁰⁰ and from its simultaneous holding applying the same rule to declaratory judgments.¹⁰¹ The Court has recently held that a federal court may enjoin neither state criminal proceedings begun after the federal complaint was filed but before proceedings of substance had taken place in the federal court,¹⁰² nor state civil proceedings "in aid of and closely related to criminal statutes,"¹⁰³ nor state contempt proceedings.¹⁰⁴ This important development is analyzed in an article in this symposium: *Dombrowski* by Professor Fiss.¹⁰⁵

The rising tide of imposition of procedural due process on the states was checked at the 1975 Term by three decisions requiring higher thresholds for showing a legally protected interest in liberty or property.¹⁰⁶ Despite the dismissal of certiorari in a case that was expected to settle the question,¹⁰⁷ there may still be hope that the

Note, *The Case for a Federal Common Law of Aircraft Disaster Litigation: A Judicial Solution to a National Problem*, 51 N.Y.U. L. REV. 231 (1976), both discussing *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975), and *Gabel v. Hughes Air Corp.*, 350 F. Supp. 612 (C.D. Cal. 1972).

99. 401 U.S. 37 (1971).

100. *Id.* at 54.

101. *Samuels v. Mackell*, 401 U.S. 66 (1971).

102. *Hicks v. Miranda*, 422 U.S. 332 (1975). *But see* *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). *See generally* *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 151 (1975).

103. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604, (1975). There is some basis for fearing that language in *Rizzo v. Goode*, 423 U.S. 362, 380 (1976), portends an extension of *Younger* to injunctions against state and local administrative officers. *But see* *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 244-47 (1976).

104. *Juidice v. Vail*, 97 S. Ct. 1211 (1977). Even more recently, the Court has somewhat limited *Huffman's* reference to exhaustion of state appellate remedies as "a necessary concomitant of *Younger*," 420 U.S. at 608, by holding that even though no state appeal was taken, federal relief is available to a § 1983 plaintiff who has sustained conviction and served sentence under a state law the further enforcement of which is challenged. *See* *Wooley v. Maynard*, 97 S. Ct. 1428, 1432-33 (1977), which also permitted injunctive relief in view of three earlier state prosecutions in rapid succession—and thereby drew a dissenting opinion from Justice White, *see id.* at 4382-83. And *Younger* principles have since been held to bar federal relief in favor of a general attachment act on due process grounds while the state court enforcement action is pending. *Trainor v. Hernandez*, 45 U.S.L.W. 4535 (U.S. May 31, 1977).

105. Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977).

106. *Paul v. Davis*, 424 U.S. 693 (1976); *Bishop v. Wood*, 426 U.S. 341 (1976); and *Meachum v. Fano*, 427 U.S. 215 (1976), *discussed in* *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 86-104 (1975).

107. *Burrell v. McCray*, 426 U.S. 471 (1976), *dismissing cert. for* 516 F.2d 357 (4th Cir.), *cert. granted*, 423 U.S. 923 (1975).

Court will retreat from its unexplained and, in the writer's view, ill-advised intimations that state prisoners seeking relief under the Civil Rights Act need not exhaust administrative remedies which the state has provided; if it does not, Congress may be persuaded to act. Federal habeas corpus was substantially restricted when the Court held it unavailable for Fourth Amendment claims of state prisoners to whom the state had provided an opportunity for full and fair litigation in its own courts.¹⁰⁸ Any reader familiar with views I expressed some years ago¹⁰⁹ will not be surprised to learn that I applaud this result, although I would have preferred to have seen it reached by a thoroughgoing judicial reconsideration of the whole subject of collateral attack on criminal convictions or, failing that, by legislation.¹¹⁰ A different perspective on this subject is provided by Professor Cover's and Mr. Aleinikoff's article in this symposium.¹¹¹

Furthermore the Eleventh Amendment still lives, to the extent of barring federal court actions by private persons seeking funds in the state treasury even when the funds have come there through alleged violation of federal regulations concerning a federal welfare program;¹¹² per contra, however, when Congress has authorized damage awards in legislation enacted pursuant to § 5 of the Fourteenth Amendment.¹¹³ The loudest thunderclap regarding federal-state relations was

108. *Stone v. Powell*, 428 U.S. 465 (1976).

109. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 161-63 (1970).

110. In other words I hope the dissenters' fears of the portents of *Stone* will prove justified, not indeed to the extent of "substantial evisceration of federal habeas corpus jurisdiction," 428 U.S. at 503, but in the shape of a restriction of it to cases where it serves the function of protecting the innocent.

111. Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

112. *Edelman v. Jordan*, 415 U.S. 651 (1974).

113. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). The status of attorney fee awards under the Eleventh Amendment, a question the Court noted but did not address in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 269 n.44 (1975), remains somewhat uncertain. In disposing of the companion case of *Bitzer v. Matthews*, the Court affirmed the award of attorney fees out of the state treasury on the ground that the damage award was not barred by the Eleventh Amendment and there was express congressional authorization for fee awards to successful plaintiffs in Title VII cases. 427 U.S. at 456-57. The Court did not pass on the Second Circuit's conclusion that an award of attorney fees fell within the *Edelman* exception for awards "that have only an 'ancillary effect' on the state treasury." *Id.* See generally Note, *Attorneys' Fees and the Eleventh Amendment*, 88 HARV. L. REV. 1875 (1975). On June 1, 1976, the Court had granted certiorari in *Stanton v. Bond*, 528 F.2d 688 (7th Cir. 1976), which relied on the Court's summary affirmance in *Sims v. Amos*, 409 U.S. 942 (1972), in holding that fees could be awarded against state officials sued in their official capacities under § 1983. *Stanton v. Bond*, 426 U.S. 905 (1976). The Court's day of reckoning with the Eleventh Amendment on this subject was again postponed, however, when it summarily vacated the judgment in *Stanton*, 97 S. Ct. 479 (1976), and remanded for further consideration in light of the passage of the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No.

the decision in *National League of Cities v. Usery*,¹¹⁴ overruling *Maryland v. Wirtz*¹¹⁵ and holding that the commerce clause did not authorize application of the Fair Labor Standards Act to state and city¹¹⁶ employees exercising traditional governmental functions.¹¹⁷ On the same day that the Court thus restricted the commerce clause as a source of national power, it rendered a decision—to be sure on rather special facts—that could be taken as impairing the role of the commerce

94-559, § 2, [1976] U.S. CODE CONG. & AD. NEWS (90 Stat. 2641) (amending 42 U.S.C. § 1988 (1970)), which authorizes fee awards to prevailing parties other than the United States [i]n any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964

114. 426 U.S. 833 (1976).

115. 392 U.S. 183 (1968). *Fry v. United States*, 421 U.S. 542 (1975), was preserved but limited. *See* 426 U.S. at 852-55.

116. The Court's express inclusion of municipalities within the protection of its federalism analysis, *see* 426 U.S. at 855 n.20, prompted Philadelphia and New York to invoke the decision in lawsuits brought to test the constitutionality of the Securities and Exchange Commission's assertion of regulatory jurisdiction over issuers of municipal securities. Chazen, *More Regulation of Municipals*, N.Y.L.J. December 13, 1976, at 35, col. 3. New York subsequently consented to dismissal of its suit, N.Y. Times, Dec. 18, 1976, at 46, col. 3, and the Philadelphia suit was dismissed because compliance with the Commission's preliminary investigation was voluntary. *See* 45 U.S.L.W. 2602 (June 21, 1977).

117. The Court limited its decision to the commerce power, expressly reserving the question of Tenth Amendment limitations on such other powers as the spending power and on legislation under § 5 of the Fourteenth Amendment. 426 U.S. at 852 n.17. The view that the 1972 amendments making Title VII of the Civil Rights Act of 1964 applicable to state and municipal employees are not subject to successful attack under *National League of Cities* is strengthened by the Court's "Cf." citation to *National League of Cities* in its opinion in *Fitzpatrick v. Bitzer*, following the comment that the amendments were enacted under § 5. *See* 427 U.S. 445, 453 & n.9 (1976). The question of whether the limitations on federal regulation of states imposed by *National League of Cities* applies to legislation under § 5 is at issue in two cases now before the Court. *Hazelwood School Dist. v. United States*, 534 F.2d 805 (8th Cir. 1976), *cert. granted*, 97 S. Ct. 730 (1977); *Dothard v. Mieth*, 418 F. Supp. 1169 (M.D. Ala. 1976), *prob. juris. noted*, 97 S. Ct. 483 (1976); *see* 45 U.S.L.W. 3680-82 (U.S. Apr. 12, 1977) (summary of arguments and questions presented).

Although recognizing the landmark nature of the opinion, an early commentator has suggested that the result was foreshadowed by recent Supreme Court precedents that collectively reflect increased concern with federal intrusion on state governmental activities. Note, *Municipal Bankruptcy, the Tenth Amendment and the New Federalism*, 89 HARV. L. REV. 1871, 1881 (1976). In addition to *Younger*, 401 U.S. 37 (1971), *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), and *Edelman v. Jordan*, 415 U.S. 651 (1974), the note-writer points to *Employees v. Department of Pub. Health and Welfare*, 411 U.S. 279 (1973), *O'Shea v. Littleton*, 414 U.S. 488 (1974), *Rizzo v. Goode*, 423 U.S. 362 (1976), and *Paul v. Davis*, 424 U.S. 693 (1976). Note, *supra* at 1874-78. It would have taken someone more perspicacious than this writer to extrapolate *National League of Cities* from those decisions. For additional comment, prior to the decision, *see* G. GUNTHER, *supra* note 14, at 126; Tribe, *Intergovernmental Immunity in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 88 HARV. L. REV. 682, 697-98 n.78 (1976); *The Supreme Court, 1974 Term*, 88 HARV. L. REV. 49, 50 & n.15 (1975).

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clause as a shield against state action that discriminates against citizens of another state.¹¹⁸ Altogether June 24, 1976, was one of the poorest days the commerce clause has had for a century.¹¹⁹ We surely have not heard the last of these cases, and certainly not of *National League of Cities*, which is discussed in Professor Michelman's penetrating article in this symposium,¹²⁰ and whose implications for state enforcement of federal environmental standards is discussed in Professor Stewart's article.¹²¹ Whatever the verdict of history may be, these decisions at least are a sure sign that the judicial tide with respect to national power may ebb as well as flow.

This, then, is a skeletonized historical background of the problems to which this symposium, so properly dedicated to Mr. Justice Brennan, is addressed. The discussion should provide some answers to Professor Gunther's provocative questions:

What are the values, historical and contemporary, of federalism? Can it still be said that federalism increases liberty, encourages diversity, promotes creative experimentation and responsive self-government? Or is it a legalistic obstruction, a harmful brake on governmental responses to pressing social issues, a shield for selfish vested interests? Is federalism a theme that constitutional law must grapple with simply because it is *there*, in the Constitution? Is the prime challenge it poses that of minimizing the obstacles that the complexities of federalism put in the way of meeting modern needs? Or does federalism embody more appealing values that deserve some of the imaginative enthusiasm with which modern constitutional law embraces the promotion of such values as equality and freedom of speech?¹²²

Clearly Mr. Justice Black, who played no small part in strengthening the role of the national government at the expense of the states, would have answered the second and the final question with a resounding "Yes." So, for what it is worth, would I. Although some state govern-

118. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). This upheld a Maryland statute which, in authorizing state bounties for the processing of "hulks," i.e., automobiles wrecked in Maryland, provided more favorable terms for persons doing the processing within the state.

119. It would be dangerous, however, to regard the *Hughes* case as having much doctrinal significance. The Court did not even mention it in *Boston Stock Exchange v. State Tax Comm'n*, 975 S. Ct. 599 (1977), when it unanimously struck down, under the commerce clause, an amendment to the New York stock transfer tax which gave advantage to sales made within New York.

120. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977).

121. Stewart, *supra* note 95.

122. G. GUNTHER, *supra* note 14, at 82-83.

ments may be ignorant or venal, many are far-seeing and courageous; and not all wisdom reposes in Washington. There is still truth in Mr. Justice Brandeis' renowned observation:

It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.¹²³

No-fault insurance is a sufficient example; we may end up with a uniform federal system or minimum federal standards, but we should never have had anything save for experimentation by the states. We must stand in awe and admiration of the design of the Framers and of the success of the Supreme Court in fleshing it out—preventing one state from getting in the way of others and endowing the central government with power to act on a national basis when Congress finds this to be warranted, but leaving to the states the final decision on the bulk of day-to-day matters that can best be decided by those who are closest to them. While I expect we shall be forced to pursue the centripetal path of the last century, we should not rush along it too fast or too far; the question whether action by the national government is needed should always be asked. To paraphrase T. R. Powell, how fast is too fast and how far too far are matters on which the writer of a foreword need not express an opinion.

123. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).